OCT 19 1992

No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE WEST VIRGINIA CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE WEST VIRGINIA CHAMBER OF COMMERCE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The West Virginia Chamber of Commerce ("Chamber") hereby requests, pursuant to Rules 21.2(b) and 37.2 of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of petitioner. The Chamber has obtained consent from petitioner's counsel to file this brief.[1] Counsel for respondents, however, refused to grant consent.

The Chamber, headquartered in Charleston, is West Virginia's largest non-profit federation of businesses, representing more than 1,000 corporations, partnerships and proprietorships. The Chamber also coordinates the activities of approximately 56 local chambers of commerce, with aggregate memberships exceeding 25,000 businesses,

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[1] A letter of consent from petitioner's counsel has been filed with the Clerk of the Court.

and provides assistance to several business, trade and professional associations. Substantially all of the private employment in West Virginia has been created by businesses represented, either directly or through local affiliates, by the Chamber. The Chamber regularly advocates its members' views in court on issues of statewide and national concern to the business community.

The Chamber has a practical interest in the fair and sensible application of punitive damage statutes. The capricious application of such statutes, as exemplified by the decision below, will have highly deleterious effects on a business climate which the Chamber and its local affiliates have worked hard to improve over many years. Indeed, in today's world of highly mobile businesses, West Virginia must compete with similar states for businesses that are relocating in order to escape costly overhead in large cities and to provide a better quality of life for their employees. The threat posed by capricious impositions of massive punitive damage awards undoubtedly will hinder West Virginia's ability to compete in this regard.

The Chamber thus believes that it offers both a strong and unique perspective upon this case as *amicus curiae* that will assist this Court in evaluating the opinion of the Supreme Court of Appeals of West Virginia and its relation to this Court's opinion in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991). The foregoing motion therefore should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against TXO made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991), violated the Fourteenth Amendment.

2. Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated substantive due process.

3. Whether petitioner was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), interpreting the requirements of the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Browning-Ferris Indus. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989)	4
Commonwealth Lloyd's Ins. Co. v. *Thomas*, 825 S.W. 2d 135 (Tex. Ct. App. 1992), *writ of error filed* April 22, 1992	8
Eichenseer v. *Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991)	5
Felder v. *Casey*, 487 U.S. 131 (1988)	8
Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991)	3, 8
Glasscock v. *Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992)	5
Hoffman Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)	6
James B. Beam Distilling Co. v. *Georgia*, 111 S. Ct. 2439 (1991)	3, 8, 9
Matthews v. *Eldridge*, 424 U.S. 319 (1976)	6
Oberg v. *Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App.), *review granted*, 822 P.2d 1194 (Or. 1991)	5
Pacific Mut. Life Ins. Co. v. *Haslip*, 111 S. Ct. 1032 (1991)	2, 4, 5, 6, 7
Principal Fin. Group v. *Thomas*, 585 So.2d 816 (Ala.), *cert. denied*, 112 S. Ct. 649 (1991)	6
Republic Ins. Co. v. Hires, 810 P.2d 790 (Nev. 1991)	8
Smith v. *Wade*, 461 U.S. 30 (1983)	8
Thomas v. *Principal Fin. Group*, 566 So.2d 735 (Ala. 1990)	5

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BRIEF OF THE WEST VIRGINIA CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The West Virginia Chamber of Commerce ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioner. The interest of the Chamber as *amicus curiae* is fully set forth in the Motion for Leave to File a Brief as *Amicus Curiae* printed herewith *ante*.

SUMMARY OF ARGUMENT

In the decision below, the West Virginia Supreme Court upheld a punitive damage award of ten million dollars against petitioner, TXO Production Corp. ("TXO"), which was no less than 526 times the amount of compensatory damages of $19,000 awarded to respondents, Alliance Resources Corp., Tug Fork Land Company, George King, and Grover C. Goode. This case was not one in which a plaintiff suffered grevious personal injury or a business coldly calculated that physical injuries from a defective product ultimately would cost less than removing the defect. Instead, the underlying action here was for "slander of title." Respondents claimed that petitioner had diminished the value of respondents' title to oil and gas reserves on one parcel of land by filing a false "quiet title" action. The West Virginia Supreme Court upheld this stunning award of punitive damages on nothing more than its perception that TXO fell into the category of punitive damage defendants who are "really mean," as opposed to those who are "really stupid." If there ever were a paradigmatic case of punitive damages arbitrarily imposed under a wholly ineffective system of review, this is that case.

The West Virginia Supreme Court's decision amply illustrates the confusion in lower courts around the country respecting the Fourteenth Amendment due process requirements applicable to punitive damage awards. This Court offered some guidance as to these requirements in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991), but it is now obvious that *Haslip* failed fully to clarify the requirements in a way that will ensure a rational process of imposing punitive awards. Because the West Virginia Supreme Court, like other state courts, has refused in the wake of *Haslip* to tether punitive damage awards to any reasonable guidelines, this Court's review of the system of awarding damages is once again warranted.

This case also presents an important and timely issue involving the retroactive application by state courts of new rulings on federal law. The West Virginia Supreme Court's opinion does further violence to petitioner's due process rights by failing to adhere to the rule of *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which this Court held that a newly announced federal rule cannot be selectively applied only to the case at bar and prospective cases, but also must be applied retroactively to cases still pending or not barred by res judicata or statutes of limitations, even if they arise on facts that predate the facts in the case at bar. In *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court announced, on the basis of *Haslip*, guiding factors in evaluating the propriety of a punitive award. *Garnes* was remanded for a new trial using the newly announced guidelines. However, a new trial was not afforded to petitioner. The Supreme Court's refusal to allow TXO the same opportunity to take advantage of these fundamental procedural protections cannot be squared with *James Beam*. Accordingly, review is further warranted so that this Court can make clear that the rule of *James Beam* applies to state courts as well as to federal courts when the state courts are interpreting the requirements of federal law.

REASONS FOR GRANTING THE PETITION

The opinion of the West Virginia Supreme Court poses a serious threat to businesses in West Virginia, and its odd application of this Court's holding in *Haslip* reflects a broader confusion that threatens businesses throughout this country. Without a more precise and detailed statement from this Court of the requirements of due process in the punitive damages context, the imposition of indiscriminate punitive damage awards will continue to wreak havoc upon the American business community, drive up costs at the expense of jobs at home, and harm competitive capabilities abroad.

1. This Court's holding in *Haslip* simply has not provided a clear enough message to lower courts with respect to the requirements of due process in the punitive damages context. This confusion arises out of the fact that *Haslip* examined and approved only Alabama's scheme for ensuring that punitive damage awards have some foundation in rationality. The approval of one common-law system, however, not only left the status of other, specific schemes uncertain, but also failed to identify any elements of Alabama's scheme as themselves essential to procedural due process. This uncertainty has virtually guaranteed the continued "skyrocketing" of punitive damage awards, which was of profound concern to this Court in *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989). See *Haslip*, 111 S. Ct. at 1038 ("In *Browning-Ferris* . . . all nine participating Members of the Court noted concern").

Several members of this Court foresaw the potential ambiguity in *Haslip*. Justice Scalia argued that the majority decision "provides no guidance as to whether any *other* procedures are sufficiently 'reasonable,' and thus perpetuates the uncertainty that our grant of certiorari in this case was intended to resolve." 111 S. Ct. at 1046-47 (Scalia, J., concurring). Justice Kennedy pointed out

that "[i]t is difficult to comprehend on what basis the majority believes the common law method might violate due process in a particular case after it has approved that method as a general matter, and *this tension in its analysis now must be resolved in some later case.*" *Id.* at 1055 (Kennedy, J., concurring) (emphasis added). See also *id.* at 1056-57 (O'Connor, J., dissenting) ("The Court's holding will . . . substantially impede punitive damages reforms").

After nearly two years and the failure of *Haslip* adequately to protect the due process rights of punitive damage defendants, the issue is again ripe for review. Numerous cases from both federal and state courts reveal the complete absence of due process limitations in punitive damage awards. See, *e.g.*, *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (compensatory damages of $317,625, punitive damages of $6.1 million), *cert. denied*, 112 S. Ct. 1778 (1992); *Thomas* v. *Principal Fin. Group*, 566 So.2d 735 (Ala. 1990) (compensatory damages of $1,000, punitive damages of $750,000); *Eichenseer* v. *Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) (compensatory damages of $1,000, punitive damages of $500,000); *Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App.) (compensatory damages of $735,513, punitive damages of $5 million), *review granted*, 822 P.2d 1194 (Or. 1991). In light of the enormity of the private interests at stake, and especially in light of the effect that such awards have had on businesses throughout this country, review by this Court now is warranted and necessary.

2. The circumstances of this case offer the Court an excellent opportunity to further delineate the due process requirements outlined in *Haslip*. The West Virginia Supreme Court's standard for reviewing punitive damages on appeal offers no meaningful check at all upon the passions of "runaway juries" and thus constitutes a clear violation of due process. Cf. *Haslip*, 111 S. Ct. 1056 (O'Connor, J., dissenting) ("The Court relies heav-

ily on the State's mechanism for postverdict judicial review"). The West Virginia Supreme Court has created a distinction between "really mean" and "really stupid" that is impossible to draw in any principled or predictable way.[1] Two justices of the supreme court wrote separately to note that "by suggesting the use of such subjective and nontechnical terms as 'really stupid' and 'really mean,' the majority has offered no practical guidance to attorneys or judges in analyzing punitive damages cases." Pet. App. 54a.

The distinction becomes especially difficult to draw when judges must assess the actions of a business entity rather than those of a particular individual. Nevertheless, the court below has attached to its categorization scheme the most enormous of consequences, that is, a limitation on the ratio of punitive damages to compensatory damages in "really stupid" cases of five to one versus more than *five hundred* to one in "really mean" cases. Such capriciousness in a civil justice system cannot be tolerated under this Court's holding in *Haslip*. See 111 S. Ct. at 1045 ("post-verdict review [must] ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"). See also *Matthews* v. *Eldridge*, 424 U.S. 319, 344 (1976) (greater procedural protections are needed as private property stakes increase and the risk that existing procedures will cause error also increases).[2]

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[1] The supreme court itself noted the difficulty in using its categorization scheme and, in fact, eventually abandoned its attempt to categorize *Principal Financial Group* v. *Thomas*, 585 So.2d 816 (Ala.), *cert. denied*, 112 S. Ct. 649 (1991). Pet. App. 36a n.11 & Pet. App. 51a, 52a (failing to list *Thomas* in either category).

[2] The supreme court's appellate standard also is void for vagueness on constitutional grounds. *See Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (appellate scrutiny under the vagueness doctrine must intensify in proportion to the severity of the penalty imposed).

Moreover, the vacuous quality of the West Virginia Supreme Court's standard for reviewing punitive damages awards is itself a reflection of *Haslip*'s failure to provide meaningful guidelines to courts around the country. In announcing its standard, the supreme court claimed to have "examined all of the punitive damages opinions issued since *Haslip* was decided in an attempt to find some pattern in what courts find reasonable." Pet. App. 35a. It is therefore revealing that the supreme court, after such an examination, should have arrived at the virtually meaningless system of categorization that it did. See also Pet. App. 38a ("We cannot say that our examination of post-*Haslip* cases has led us to a crystal clear bright line of rule").

3. Two other features of the West Virginia Supreme Court's punitive damages scheme make this case particularly suitable for review. First, the Supreme Court's deference to the jury's verdict (see Pet. App. 40a) exacerbates the arbitrary and capricious nature of the West Virginia punitive damages scheme. See *Haslip*, 111 S. Ct. at 1063 (O'Connor, J., dissenting) (deference in Alabama's review mechanism makes "effective review even more unlikely"). In determining the degree to which petitioner's conduct might be deemed "reprehensible," the supreme court looked to the size of the jury's punitive damage award. Pet. App. 40a. The enormity of that award made it clear to the supreme court that petitioner belonged in the category of "really mean" defendants who are eligible for awards of punitive damages up to, and beyond, five hundred times the level of punitive damages. But this method of review is completely circular: The amount of the jury's award determines whether the defendant was "really mean" or "really stupid," and the category justifies the amount of the award. The supreme court's review therefore provides no effective check at all on "punitive damage awards [that] are frequently based upon the caprice and preju-

dice of jurors." *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

Second, the West Virginia Supreme Court's opinion makes clear that West Virginia, like certain other states, does not require trial courts in punitive damages cases to state on the record their reasons for interfering, or not interfering, with an award that is challenged as excessive. See, *e.g.*, *Commonwealth Lloyd's Ins. Co.* v. *Thomas*, 825 S.W.2d 135, 149 (Tex. Ct. App. 1992), *writ of error filed* April 22, 1992; *Republic Ins. Co.* v. *Hires*, 810 P.2d 790 (Nev. 1991). Without serious and open review at the trial level, however, appellate review becomes more critical and yet less effective. At bottom, the Court in *Haslip* identified interrelated factors to promote a fair system of awarding punitive damages and this case squarely presents the issue of whether these checks were mandatory or merely precatory.

4. The West Virginia Supreme Court's opinion also contradicts this Court's holding in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). There, the Court held that "new rules" respecting federal rights cannot be applied in a "selectively prospective" fashion, that is, a court cannot "retroactively" apply new rules it announces only to the litigants of that case, and thereby prevent other litigants from taking advantage of these new rules. *Id.* at 2448. Here, the West Virginia Supreme Court announced "new rules"—procedures which are to govern all punitive damages awards—in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). Although these procedures were founded upon federal due process rights and the supreme court's interpretation of *Haslip*, the supreme court refused to remand this case for a new trial on punitive damages as it did in *Garnes*. As the petition demonstrates (Pet. 18-20), the supreme court's refusal contradicts this Court's holdings in *James Beam*, as well as *Felder* v. *Casey*, 487 U.S. 131, 138

(1988) ("'[a] federal right cannot be defeated by the forms of local practice'") (quoting *Brown* v. *Western Ry.*, 338 U.S. 294, 296 (1949)).

The West Virginia Supreme Court's refusal to allow petitioner the same right to a new trial on punitive damages as was afforded to the litigants in *Garnes* cannot be cured by its claim that such a ruling would "unnecessarily send far too many cases back for retrial." Pet. App. 32a. Litigants in petitioner's situation "are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements." *James Beam*, 111 S. Ct. at 2447. Nor can the supreme court assert that West Virginia's own "choice-of-law" rules govern remedial applications of these "new rules": "[T]he antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise." *Id.* at 2443.

As this case demonstrates, this Court needs to make clear that the retroactivity holding of *James Beam* applies to state courts that have announced "new rules" derived from federal law. Moreover, the issue is a recurring one because state courts around the country must apply their interpretations of *Haslip* to other, pending cases. Because *James Beam* obviously requires clarification, and because the issue is timely given the remedial "ripple effects" of *Haslip*, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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